

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HARRY W. WALLACE AND JO-ANN WALLACE	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1978 through 1980.	:	

Petitioners, Harry W. Wallace and Jo-Ann Wallace, P.O. Box 545, Williston, Vermont 05495, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 through 1980 (File No. 803801).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, W.A. Harriman State Office Building Campus, Albany, New York on July 22, 1988 at 1:40 P.M., with all briefs to be filed by September 23, 1988. Petitioner appeared by Sullivan, Sorgi & Dimmock (Peter Sorgi, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

- I. Whether petitioners timely claimed refunds for the years 1978 through 1980.
- II. Whether the denial of petitioners' claims for refund pursuant to Tax Law § 697(d) is ripe for adjudication before the Division of Tax Appeals and, if so, whether said claims should be granted.

FINDINGS OF FACT

1. Petitioners filed New York State income tax nonresident returns on a calendar year basis showing overpayments of New York State personal income tax as follows:

<u>Year</u>	<u>Date Filed</u>	<u>Amount of Overpayment</u>
1978	April 19, 1983	\$ 4,978.00
1979	April 19, 1983	\$31,470.00
1980	October 24, 1984	\$77,905.00

In each instance, the tax return requested that the total overpayment be credited to the following year's estimated tax.

2. On or about February 10, 1986 petitioners filed claims for credit or refund of personal income tax as follows:

<u>Year</u>	<u>Amount Sought</u>
1978	\$ 4,978.00
1979	\$31,470.00
1980	\$46,405.00

3. Each claim for refund stated, in part, that petitioners and the accountant who represented them were ill and therefore the returns were prepared late.

4. On March 25, 1985 the Audit Division issued a notice disallowing petitioners' claims for refund or credit of personal income tax for the years 1978 and 1979. The explanation on the notice stated that petitioners had not submitted any evidence which would allow the refund requested. On May 19, 1986, the Audit Division issued a notice disallowing petitioners' claims for refund or credit of personal income tax for the years 1978 and 1980.¹ The notice explained that the claims had been disallowed for the following reason:

"Since 1978 and 1980 were filed after the statute of limitations had expired consideration for refunds cannot be given. This disallowance is based on timeliness only."

5. It was Mr. Wallace's practice to rely on his accountant to complete the necessary tax forms. This reliance was considered justified by petitioners' accountant's timely filing of quarterly estimated income tax payments.

6. During the period in issue, Mr. Wallace was suffering from heart difficulties. These problems led to a heart bypass operation and later to a heart replacement. During this same period of time, Mr. Wallace's accountant was also suffering from a deteriorating medical condition which resulted in his death. However, Mr. Wallace was not aware of his accountant's medical condition and had no means to ascertain the need to file a claim for refund. Following the accountant's death, neither the accountant's representatives nor petitioners have been able to locate all the files pertaining to petitioners' returns.

CONCLUSIONS OF LAW

A. That Tax Law § 687(a) provides, in pertinent part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return".

¹No explanation was provided as to why petitioners' claim for the year 1978 was disallowed a second time.

B. That on the basis of the foregoing section of the Tax Law, it is concluded that petitioners' claims for refund were untimely. In their petition, petitioners have acknowledged that the estimated income tax payments were remitted timely. Consequently, since the tax returns indicated that petitioners were calendar year taxpayers, the estimated income taxes were deemed paid on April 15 of the following calendar year (Tax Law § 687[i]). Thus, the operative dates may be examined by reference to the following chart:

	<u>1978</u>	<u>1979</u>	<u>1980</u>
Date tax paid	April 15, 1979	April 15, 1980	April 15, 1981
Date returns filed	April 19, 1983	April 19, 1983	October 24, 1984
Date claim filed	February 10, 1986	February 10, 1986	February 10, 1986

C. That while the claims for refund were made within three years of the time the returns were filed, petitioners are not entitled to refunds under section 687(a) of the Tax Law since no tax was paid within the three years immediately preceding the filing of the claims (Tax Law § 687[a]).

D. That, assuming arguendo that the income tax returns were claims for refund, the claims would still be untimely since they were not filed within two years from the time the tax was paid and since no tax was paid within three years of the filing of the returns (Tax Law § 687[a]).

It is noted that petitioners' argument at the hearing that extensions of time to file returns were probably filed in New York since extensions of time to file returns were filed in Vermont is far too speculative to warrant consideration.

E. That during the period in issue, Tax Law § 697(d) provided as follows:

"(d) Special refund authority.--Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

F. That by section 17 of chapter 282 of the laws of 1986, effective September 1, 1987, the State Tax Commission was abolished. Thereafter, references in statutes to the Tax Commission are deemed to pertain to the Division of Tax Appeals or the Tax Appeals Tribunal when references are made to the administration of the administrative hearing process (Tax Law § 2026). In all other instances, references to the Tax Commission are deemed to pertain to the Division of Taxation or the Commissioner of Taxation and Finance (Tax Law § 2026).

G. That the special refund authority set forth in Tax Law § 697(d) does not relate to the administration of the administrative hearing process. Therefore, the reference to the Tax Commission set forth in Tax Law § 697(d) is deemed to be to the Division of Taxation or the Commissioner of Taxation and Finance.

H. That in this instance, the taxpayers filed a petition requesting a refund pursuant to Tax Law § 697(d). In response, the Audit Division, which is part of the Division of Taxation,

submitted an answer which, among other things, specifically stated that petitioners are not entitled to a refund under section 697(d) of the Tax Law. Since the rules and regulations do not contain any method to apply for a refund pursuant to section 697(d) of the Tax Law, the answer must be deemed a denial of the refund under section 697(d) of the Tax Law by the Division of Taxation and its head, the Commissioner of Taxation and Finance (Tax Law § 170[1]). Therefore, the matter is considered ripe for adjudication before the Division of Tax Appeals.

I. Petitioners have relied on Mercury Mach. Importing Corp. v. City of New York (3 NY2d 418) and the statutory authority presented therein for the proposition that the granting of relief is mandatory. However, it has subsequently been explained that although some statutes which contain permissive language are mandatory where a party would not have a remedy in the absence of the statute, the refund authority under Tax Law § 697(d) is permissive because taxpayers have the right to file claims for refund under Tax Law § 687(a) (Matter of Fiduciary Trust Co. of N.Y. v. State Tax Commn., 120 AD2d 848).

J. That petitioners' claim for a refund under Tax Law § 697(d) was properly denied. Here, it cannot be said that any estimated tax payments were illegally or erroneously collected by the Audit Division. Moreover, although Mr. Wallace and his accountant were ill, the record does not show that the estimated tax payments were made under a mistake of fact. Thus, petitioners have not established that the Audit Division's denial of the refund was an abuse of discretion. Petitioners' contention at the hearing that they did not file timely claims for refund because the Audit Division misaddressed letters to them pertaining to other matters is unpersuasive. Petitioners were not precluded from filing timely claims for refund.

K. That the petition of Harry W. Wallace and Jo-Ann Wallace is denied.

DATED: Albany, New York
December 8, 1988

/s/ Arthur S.

Bray _____
ADMINISTRATIVE LAW JUDGE